Office of Labor Relations

LABOR RELATIONS LETTERS

Date: November 15, 2006 **Letter No. LR 2006-03**

Subject: **Incorporation of Federal labor standards provisions and prevailing wage decisions into bid specifications and contracts**

I. Purpose

The purpose of this Letter is to explain HUD policy and to provide guidance for HUD staff and program participants regarding acceptable methods for incorporating Federal labor standards clauses and prevailing wage decisions into bid specifications and contracts for construction work subject to Davis-Bacon wage rates and maintenance work subject to HUD-determined prevailing wage rates.

Many HUD programs require the payment of Federal prevailing wage rates. Covered construction work is subject to prevailing wage rates determined by the Department of Labor (DOL) pursuant to the Davis-Bacon Act. Covered maintenance work (e.g., public and Indian housing operations) is subject to prevailing wage rates determined or adopted by HUD.

When covered construction or maintenance work will be performed by contract, the agency or other entity contracting for the work must incorporate certain mandatory Federal labor standards provisions and the applicable Federal wage decision in bid specifications and contracts. This Letter will discuss the acceptable means by which these provisions and wage decisions may be incorporated into these documents. [1]

II. Federal labor standards provisions (HUD Forms)

HUD has developed forms which contain the contract labor standards provisions required for construction work covered by Davis-Bacon wage rates, and for maintenance work covered by HUD wage rates. These forms are available on-line at HUDClips (www.hudclips.org/cgi/index.cgi), or in hard copy from HUD's Customer Service Center at

[1] Note that for the Indian Housing Block Grant program, Federal labor standards provisions and Federal wage decisions are not applicable to contracts that are covered by tribally-determined prevailing wage rates.

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-3-1 (RC); R-6, R-6-2; R-7, R-7-2, R-9 (Labor Relations)

(800)767-7468.

These HUD forms are:

(1) HUD-2554, Supplementary Conditions to the Contract for Construction [Housing programs – Davis-Bacon wage rates]

(2) HUD-4010, Federal Labor Standards Provisions [Community Planning and Development programs – Davis-Bacon wage rates]

(3) HUD-5370, General Conditions of the Contract for Construction [Public Housing programs (must be used where the contract value is greater than $100,000) – Davis-Bacon wage rates]

(4) HUD-5370-EZ, General Conditions for Small Construction/Development Contracts [Public Housing programs (may be used in lieu of the HUD-5370 where the contract value is greater than $2,000 but no more than $100,000) – Davis-Bacon wage rates]

(5) HUD-5370-C, General Conditions for Non-Construction Contracts, Section II [Public Housing programs – HUD wage rates]

Note: The Offices of Labor Relations and Native American Programs are working on HUD forms that will contain Federal labor standards provisions specific to Indian housing programs. Once approved and issued, these forms will also be available at HUDClips.

III. Federal prevailing wage decisions

This Letter discusses two types of Federal prevailing wage decisions: Davis-Bacon wage decisions that are applicable to construction work; and HUD wage decisions that are applicable to public and Indian housing maintenance work.

Davis-Bacon wage decisions are available on-line at www.wdol.gov or may be obtained through HUD's Labor Relations staff.

HUD wage decisions are not yet available on-line through HUD. These may be obtained in hard-copy from HUD's Labor Relations staff.

IV. Methods of incorporation

The labor standards clauses and wage decisions may be incorporated into bid specifications and contracts by one or more of the following methods:

(1) Incorporation by "hard-copy". The applicable HUD form and wage decision may be physically bound/attached to the contract (and bid specifications, if applicable) as issued by HUD (HUD forms and HUD wage decisions) or DOL (Davis-Bacon wage decisions).

(2) Incorporation into other documents. The clauses/text of the applicable HUD form and wage decision may be incorporated into other documents (e.g., into the program participant's own forms) that are bound/attached to the contract (and bid specifications, if applicable) or incorporated by reference (see paragraph 3, below). The HUD program participant (e.g., State, local, or tribal agency; owner/developer) is responsible for the accuracy of the content. In all cases, the requirements imposed by the applicable HUD form and wage decision remain in force.

(3) Incorporation by reference. The applicable HUD form and wage decision, or other documents containing the HUD form clauses/wage decision, may be incorporated into the contract and any bid specifications by reference. The reference must be specific as to the exact form or clauses that are incorporated, and where the form or clauses may be accessed or obtained (e.g., HUDClips, agency web site). Davis-Bacon wage decisions may be incorporated by reference to www.wdol.gov and to the specific number, modification number, and date of the applicable wage decision. HUD wage decisions are not available at HUD's web site; however, a public or Indian housing agency may post any applicable HUD wage decision to its own web site and reference that site. Program participants must provide hard-copies of any referenced forms, clauses, and/or wage decisions on request.

Any questions regarding this Letter should be directed to the Regional or Field HUD Labor Relations staff responsible for the jurisdiction involved. A list of Labor Relations staff and contact information is available at the Office of Labor Relations web site: www.hud.gov/offices/olr

/S/

Edward L. Johnson

Director

Office of Labor Relations

Office of Labor Relations

LABOR RELATIONS LETTERS

Date: November 15, 2006 **Letter No. LR 2006-02**

Subject: **Custody, security and disposal of Federal labor standards compliance documents and investigative records**

I. Purpose.

The purpose of this Letter is to reiterate HUD policy and to provide guidance for HUD staff and program participants regarding the custody, security, and disposal of Federal labor standards compliance documents and investigative records.

The Department of Housing and Urban Development (HUD), and State, local, and tribal agencies as well as non-profit and some for-profit recipient organizations that administer HUD programs, collect, generate, and retain labor standards compliance documents and investigative records related to work subject to Federal prevailing wage requirements (e.g., Davis-Bacon wage and reporting requirements, and HUD-determined maintenance wage rates). These include payroll reports and other compliance documents, and investigative records such as employee interview statements. These documents and records contain highly sensitive and confidential information. For example, payroll reports contain workers' personal information such as their names, Social Security Numbers (SSNs), home addresses, earnings, and net wages; and may contain the employer tax identification numbers (EINs). Employee interview statements record the identity and statements made by persons who are ensured confidentiality. With the growing rise in identity theft and fraud, it is critical that HUD and agencies administering HUD programs carefully guard this sensitive information so that the person(s) or firm(s) to which that information pertains is not unduly exposed to financial or personal risk.

II. Definitions.

For the purposes of the policy and guidelines expressed in this Letter:

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-3-1 (RC); R-6, R-6-2; R-7, R-7-2, R-9 (Labor Relations)

HUD program participants shall mean State, local, and tribal agencies as well as non-profit and some for-profit organizations that administer HUD programs and are responsible for Federal labor standards administration, compliance, and enforcement requirements applicable to the HUD programs they administer. This term also includes any contractors, consultants or others that participate in such labor standards activities on a participant's behalf, including subgrantees or others if they are in possession of labor standards compliance documents or investigative records.

Informant shall mean any person who provides information relating to labor standards compliance or enforcement. An informant may be a laborer or mechanic who files a complaint of underpayment. An informant may also be a person who is not a complainant, or is not a laborer or mechanic, but who provides information relating to labor standards compliance or enforcement.

Investigative records shall mean documents assembled and/or created during the course of labor standards compliance reviews. Such documents include Records of On-site Interview (HUD-11s); employee questionnaires; interview statements; records and notes from informant interviews; complaints; records supplied by complainants such as pay stubs, W-2s, and work calendars; back wage computations; determinations of wages due; schedules of wages due; and enforcement reports (required by Department of Labor regulations at 29 CFR Part 5, Section 5.7[1]).

Labor standards compliance documents shall mean documents relating to labor standards administration and employer compliance. These documents include employer records such as payroll reports; time cards; fringe benefit statements and reports; employee authorizations for deduction; and apprenticeship/trainee registrations; and other documents pertaining to labor standards compliance.

Sensitive information shall mean the names, SSNs, and addresses of individuals reported on payrolls and other compliance documents; EINs; and the identity of any informant who makes or provides a statement in written or oral form relating to labor standards activities and any portion of such statement(s) that may reveal that informant's identity.

III. Custody, security and disposal of Federal labor standards compliance documents and investigative records.

HUD staff and program participants are required to collect, preserve, and retain labor standards compliance documents and investigative records for a period of three (3) years following the completion of the covered work, after which these documents and records may

[1] See DOL Regulations 29 CFR 5.7(a); and Labor Relations Letter 92-02.

be destroyed provided there are no outstanding investigations, enforcement activities, or appeals.[2] In addition, HUD staff and program participants create and transmit documents, in hard copy and in media records (e.g., computer files, storage disks, email, facsimile), concerning labor standards compliance and enforcement actions that relate to, or contain, sensitive information. Examples include review notes; back wage computations; notices to employers concerning compliance discrepancies; schedules of wages found due; and 5.7 enforcement reports relating to enforcement actions, referrals for administrative review of findings in dispute, and recommendations for debarment. Because of the sensitive nature of the information contained in these documents and records, HUD staff and program participants must exercise care that sensitive information is not disclosed except to persons authorized to access the information and that documents and records that are created contain sensitive information only as necessary. The following guidelines will minimize the risk of improper and/or unnecessary disclosure.

a) Keep sensitive materials secure at all times. HUD staff and program participants must ensure that documents and records containing sensitive information are secured while in their custody. Aggressive steps must be taken to prevent unintended disclosure of this sensitive information. For example, such materials must not be left in areas accessible to the public or left unattended in open settings; store these materials in a secure location (e.g., locked file cabinets) at all times when not in use; lock computers when unattended; and do not leave sensitive documents on computer display screens in the view of persons who are not authorized access.

b) Do *not* include SSNs on documents and records unless it is absolutely necessary. Many times, SSNs are not relevant or not needed for the document or record purposes. Examples include review notes, back wage computation sheets, notices or schedules of back wages due that are sent to contractors or employers, and 5.7 reports concerning completed enforcement actions or referring cases in dispute or recommending debarment. Notes and computation sheets may need to distinguish between the workers that are involved, but such distinctions can usually be made by the workers' names, alone. For notices and schedules, the employer will need to know which employees have been underpaid and how much is due to each, but the employer should already have the SSNs of the affected workers. SSNs add no value to enforcement reports where no further action is required or recommended. If the enforcement report concerns findings of underpayment in dispute, the supporting documents that must accompany the report should contain the SSNs.

[2] See DOL Regulations 29 CFR 5.6(a)(2); and HUD Handbooks 1344.1, Rev 1, Chg 1, Para 3.3(c); and 2225.6, Rev 1, Chg 60, Appendix 49.

Recommendations for debarment, generally, are not supported by facts associated with SSNs.

SSNs *must* be included on very few documents. Employers must include the SSN on the first payroll report on which an employee's name appears. Program participants that transmit to HUD wage restitution that has been collected but not paid because underpaid workers could not be located must provide a schedule to HUD that includes the name, last known address and SSN for each unlocated worker.

c) Do *not* disclose the identity of any informant unless it is necessary and *only* if authorized by the informant. Informants may offer information alleging labor standards violations. Often, the allegations can be substantiated, independently, such that the identity of the informant(s) is not crucial to defending any findings of violation that may result. In such cases, then, it is not necessary to reveal the identity of any informants to defend the findings in presentations to the employer or to resolve the violations. In those instances where it is necessary to disclose the identity of the informant(s) in order to pursue resolution, the informant(s) *must* authorize the disclosure, in writing, in advance.

d) Dispose of documents and records containing sensitive information, responsibly. HUD staff and program participants must ensure that any documents and records, including media files, which contain sensitive information are shredded or otherwise destroyed at disposal. Documents and records that do not contain sensitive information may be discarded with other waste. HUD encourages recycling of waste materials whenever possible.

Any questions regarding this Letter should be directed to the Regional or Field HUD Labor Relations staff responsible for the jurisdiction involved. A list of Labor Relations staff and contact information is available at the Office of Labor Relations website: www.hud.gov/offices/olr

/S/

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Director

Office of Labor Relations

Office of the Assistant to the Secretary for Labor Relations

LABOR RELATIONS LETTERS

Date: December 2, 1996 (Rev 1) Letter No. LR-96-01

Subject: **Labor standards compliance requirements for self-employed laborers and mechanics (aka *Working Subcontractors*)**

I. HUD policy on prevailing wage applicability.
II. Compliance and certification parameters.
III. Owners of businesses working with their crews.
IV. Owner-Operators of power equipment.
V. Truck drivers.

The Federal prevailing wage requirements and compliance standards for self-employed laborers and mechanics (also referred to as "working subcontractors") have long been a confusing and contentious area for the Department of Labor (DOL), HUD, the Internal Revenue Service and contractors and subcontractors.

The following policy represents an effort to provide practical guidance for field application. The guidance more specifically concerns the wage certification requirements for self-employed mechanics and laborers on projects subject to Federal labor standards provisions including Davis-Bacon and HUD-determined maintenance and nonroutine maintenance prevailing wage rate determinations. This policy does not attempt to establish whether working subcontractors are subject to Federal labor standards nor whether such working subcontractors are *bona fide.* The clear meaning of statutory provisions and regulatory definitions does not require further examination of applicability. Additionally, statutory and regulatory language are clear that the question of whether certain self-employed laborers and mechanics are bona fide subcontractors is not germane to the issue of prevailing wage standard applicability.[1]

[1] *The DOL has issued an administrative policy which excludes "bona fide owner-operators of trucks who are independent contractors" from DBRA/CWHSSA provisions. See paragraph V. of this Letter.*

SL: Distribution: W-3-1; R-1; R-6; R-7; R-9; SL; 138-2; 138-7

I. HUD policy on prevailing wage applicability.

The Davis-Bacon Act (DBA), HUD program Related Acts (DBRA) concerning the payment of prevailing wages as determined by the Secretary of Labor, and the U.S. Housing Act of 1937 concerning the payment of prevailing wage rates established by HUD provide that the wage protections afforded in these statutes apply to laborers and mechanics employed on the covered work. The DBA and DBRA implementing regulations (29 CFR Part 5) specifically stipulate that these protections are provided **regardless of any contractual relationship which may be alleged to exist** between the contractor and such laborers and mechanics. Additionally, all laborers and mechanics must be paid unconditionally and not less often than once per week. HUD has followed DBA/DBRA prevailing wage parameters in its implementation, administration and enforcement of HUD-determined maintenance and nonroutine maintenance prevailing wage standards. (*NOTE:* The requirement to pay weekly wages is not applicable to the payment of prevailing routine maintenance wage rates related to laborers and mechanics engaged in the operation of PHA and IHA housing developments.)

Therefore, it is HUD policy that in all cases where laborers and mechanics are employed on Federal prevailing wage-covered construction, maintenance and nonroutine maintenance work, laborers and mechanics shall be entitled to compensation (in the case of Davis-Bacon wages, *weekly* compensation) at wage rates not less than the prevailing rate for the type of work they perform **regardless of any contractual relationship alleged to exist between a contractor or subcontractor and such laborers or mechanics.**

The above policy statement is not a departure from previous HUD directives. The guidance presented below establishes uniform HUD-assisted program contract administration and enforcement parameters for labor standards compliance and prevailing wage certification.

II. Compliance and certification parameters.

HUD policy clearly affords prevailing wage protection for all laborers and mechanics, regardless of contractual relationship. There is no exception to this protection for self-employed laborers or mechanics, including owners of businesses, sole-proprietors, partners, corporate officers, or others. This policy in no way precludes or limits any business or individual from participating in HUD-assisted construction, maintenance, or nonroutine maintenance work. The

issue is not one of *eligibility*, whether such persons are permitted to work on HUD-assisted projects, but of compliance standards - what HUD will accept from contractors and subcontractors to demonstrate that proper compliance has been achieved.

In this context, this Letter establishes a HUD administrative policy that laborers and mechanics may not certify to the payment of their **own** prevailing wages ***EXCEPT*** where the laborer or mechanic is the owner of a business working on the site of the work with his/her own crew. (This exception is described in detail in Paragraph III. Owner-operators of power equipment are discussed in Paragraph IV; Truck drivers are discussed in Paragraph V.)

The most frequent occurrence of self-employed workers on HUD-assisted projects involves mechanic/trade classifications (i.e., not laborer classifications). (For ease of reference, laborers and mechanics in this context are referred to as "mechanics" and include any case involving laborers.) These mechanics may be represented as sole-proprietors, self-employed mechanics, partners, or corporate officers - all with no direct employees engaged in the covered work.

Accordingly, HUD, and program participants responsible for labor standards administration and enforcement (e.g., PHAs, IHAs, CDBG recipients), *may not* accept certified payrolls reporting single or multiple owners (e.g., partners) certifying that they have paid to themselves the prevailing wage for their craft. For example, a sole-proprietor may not submit a payroll reporting himself or herself as simply "Owner" signing the certification as to his/her own wage payment from "draws" or other payment methods. Neither may several mechanics submit a payroll reporting themselves as "partners" with one or more certifying as to the payment of their wages or salaries. Such mechanics must instead be carried on the certified payroll of the contractor or subcontractor (the "responsible employer") for whom they are working and with whom they have executed a "contract" for services.

In these cases, maintenance of an accurate accounting of weekly work hours including any overtime hours for such mechanics is essential. Whatever method of compensation computation is utilized (piecework, weekly contract draw for performance), the amount of weekly compensation divided by the actual hours of work performed for that week must result in an "effective" hourly wage rate for that week that is not less than the prevailing hourly rate for the type of work involved. This computation must take into account overtime pay rates (i.e., one and one half) for all hours worked in excess of 40 hours per

week, pursuant to the Contract Work Hours and Safety Standards Act (CWHSSA), where applicable, and pursuant to the Fair Labor Standards Act where CWHSSA is not applicable.

The name, work classification, actual hours of work, effective hourly wage rate, and wage payment for each such mechanic must be reported and certified on the responsible employer's weekly payroll. Note that the effective hourly wage rate for such mechanics may fluctuate from week to week. However, the effective hourly wage rate *may not* be less than the minimum prevailing rate for the respective craft. In any case where the effective rate falls below the corresponding craft prevailing wage rate, the responsible employer must compensate the mechanic at no less than the prevailing rate on the wage determination for that craft.

III. Owners of businesses working with their crew.

Owners of businesses working with their crew on the same HUD-assisted job site may certify to the payment of their own prevailing wages in conjunction with the prevailing wages paid to their employees. This exception to reporting standards *does not* suggest that such owners are not likewise entitled to prevailing wages for their labor. Rather, it accepts the wage payment certification on weekly payroll reports by the owner for his/her own wages as that certification *accompanies* the certification offered for the payment of prevailing wages to his/her employees. Such owners need only list their name, work classification including "owner," and the daily and total hours worked. (Such owners *do not* need to list a rate of pay or amounts earned.)

IV. Owner-operators of power equipment.

Frequently, *owner-operators of power equipment* (e.g., backhoes, front-end loaders) will contract for services at a rate for both "man and machine." In these cases, the owner-operator includes liability, equipment maintenance, and salary in an hourly or contract rate for services. Because of the prevalence of such practice and the inherent difficulty in ascribing costs for liability and maintenance costs versus hourly *labor* salary, HUD and its program clients may accept a combined ("man and machine") hourly rate on the responsible contractor's certified payroll provided that such hourly rate may not be less than the rate on the wage determination for the respective power equipment operator.

Note: Owner-operators of power equipment, like self-employed mechanics, *may not* submit their own payrolls certifying to the payment of their own wages BUT must be carried on the responsible contractor's certified payroll report.

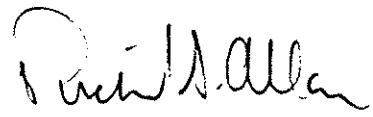
V. Truck drivers.

As outlined earlier in this Letter, a DOL administrative policy excludes *bona fide owner-operators of trucks who are independent contractors* from DBRA/CWHSSA provisions concerning their own hours of work and rate(s) of pay. These truck "owner-operators" must be reported on weekly payrolls *but* the payrolls do not need to show the hours worked or rates - only the notation "Owner-operator." ***Note*** that any laborers or mechanics, including truck drivers, employed by the owner-operator/independent contractor are subject to DBRA/CWHSSA provisions in the usual manner.

This policy ***does not*** pertain to owner-operators of other equipment such as backhoes, bulldozers, cranes and scrapers (i.e., power equipment as noted in paragraph IV, above).

These compliance standards shall take effect immediately. Any exceptions to these standards must be approved in advance in writing by HUD Headquarters Office of Labor Relations.

Any questions concerning this *Letter* may be directed to the Office of Labor Relations at (202)708-0370 or, in the case of HUD program participants, to the HUD Field Labor Relations Staff with jurisdiction for your area.



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LABOR RELATIONS LETTERS

Date: December 2, 1996 (Rev 1) Letter No. LR-96-03

Subject: **Application of Department of Labor guidance concerning "projects of a similar character"**

- **I. DOL All Agency Memoranda #130 and #131.**
- **II. Definitions: "Incidental" versus "substantial".**
- **III. HUD policy and practice.**
- **IV. Considerations for residential construction.**
- **V. Mixed-use projects.**
- **VI. Important Notes about Multiple Schedules.**
- **VI. Case Studies.**

U.S. Department of Labor (DOL) All Agency Memoranda (AAMs) #130 and #131 provide guidance as to identifying character of work (e.g., building, residential, heavy, highway) for the purpose of applying Davis-Bacon wage determinations. These memoranda are focused primarily toward public improvements such as water and sewage treatment plants and roadways rather than housing development projects. Questions, however, are raised from time to time concerning the application of AAMs 130 and 131 to HUD housing programs. The purpose of this *Letter* is to review the DOL policies in the context of HUD programs, in particular housing development.

The following is provided with the cooperation and advice of the DOL.

I. DOL All Agency Memoranda.

AAM 130 provides definitions for four (4) broad categories of construction: residential; building; heavy and highway. AAM 130 generally states that a "project" is classified as belonging in *one* of the 4 categories and that a "project" would consist of *all construction necessary to complete a facility.* In a footnote, AAM 130 states that a multiple classification may be appropriate if there are substantial portions of the project that would fall into different categories (e.g., building *and* heavy).

SL: Distribution: W-3-1; R-1; R-6; R-7; R-9; SL; 138-2; 138-7; CDBG

AAM 131 provided clarification to AAM 130 by explaining that a literal application of AAM 130 guidance may be inappropriate in certain cases. AAM 131 emphasizes in particular the complexities inherent in the application of multiple wage schedules and cautions that agencies should proceed with multiple schedules[1] **only** after advance consultation. It is further stated that area practice is determinative for any question about the proper classification of construction.

We would note that the primary thrusts of AAM 130 and 131 are not to advise on the issuance of multiple schedules or to define "incidental" or "substantial". The overall purpose of these AAMs is to ensure the appropriate selection of the *one* category of construction that best suits the proposed work. We would also note that none of the examples given in AAM 130 or 131 where multiple schedules might be appropriate is a housing project.

II. Definitions: "Incidental" vs "substantial."

Incidental items do not alter the overall character of the project but are installed for the purpose of the total project to which they relate in function. Incidental items are subject to the same wage schedule that applies to the overall project.

In addition to "incidental" relative to function, AAMs 130 and 131 discuss "incidental" relative to cost. Twenty percent of the project cost is offered as a rough guide for what is "incidental" in relation to the overall project, which *would not* warrant a multiple schedule.

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[1] ***Multiple schedules*** *refers to the practice of issuing more than one Davis-Bacon wage determination for separate and distinguishable items in a single project. These items may be incidental in function (e.g., paving of roadways for a building project) but are so substantial in relative or absolute cost as to warrant a separate wage schedule(s) from that which is issued for the primary project component.*

Multiple schedules may also be appropriate where separate and distinguishable items are ***not*** *incidental in function and/or cost. For example, a single new construction housing project that contains both highrise and low-rise buildings. These buildings are not incidental to each other but each serve a separate purpose and would generally warrant both building and residential wage determinations.*

Substantial is defined in terms of relative cost: *more* than 20% of the total project cost. In recognition that very large projects may contain components of a different character that may be sufficiently "substantial" to warrant a separate schedule even though these components may not exceed 20% of the total project cost, a $1 million or more absolute cost was offered as a supplementary guide to help define "substantial."

III. HUD policy and practice.

HUD policy and practice is consistent with AAMs 130 and 131 in that HUD seeks to identify the (one) category of construction that best suits the proposed work and issues the (one) corresponding Davis-Bacon wage determination. Most HUD-assisted projects fit cleanly in a single construction category and incidental items are not "substantial." As a result, the issuance of multiple schedules has been rare for HUD-assisted construction projects and would represent a departure from the norm. (Some geographic areas may experience more multiple schedule activity because, for example, DOL wage decisions for heavy and highway construction are issued separately.)

IV. Considerations for residential construction.

Residential construction is defined in AAM 130 as projects "involving the construction, alteration, or repair of single family houses or apartment buildings of no more than 4 stories in height. *This **includes all incidental items such as site work, parking areas, utilities, streets and sidewalks***" (emphasis added).

The primary component, which determines the character of the project and the type of wage schedule that applies, is the housing. Elements such as site work, parking areas, etc., are *incidental* in that their purpose is to support the housing. Other items which may be incidental to housing construction include swimming pools, community buildings, storage sheds, carports and on-site management offices. However, such items constructed alone, without accompanying housing construction, would be the primary component and, accordingly, the character of the project and the type of wage schedule that applies would be determined on that item alone.

Recently on some projects involving housing development it has been estimated that the cost of certain incidental items such as site improvement might exceed the DOL guide for "substantial" by absolute or relative cost. The mere existence of cost that may be "substantial," however, does not justify the use of multiple wage schedules.

Generally, any housing development project (4 stories or less) is classified as "residential." This classification is not altered by the cost of incidental items, even if such costs exceed the guide(s) for "substantial." Except in the most extraordinary circumstances, such as where local industry practice clearly demonstrates otherwise, only residential wage schedules shall be issued for housing development projects. Multiple schedules shall not be issued because of the incidental items noted above and other similar items. HUD Field Labor Relations staff shall consult with the appropriate Headquarters Labor Relations representative in advance where the issuance of multiple schedules is contemplated for a housing development project.

V. Mixed-use projects.

Mixed-use projects are those which contain elements of different construction characters *but* these different elements are ***not incidental*** to each other[2]. Examples include a housing project that contains both low-rise and highrise buildings; and a 4-story apartment building with commercial space on the first floor. The different elements in these cases are components that each have their own purpose - they are not merely supportive of another element's function. Therefore, multiple schedules are appropriate where mixed-use projects are involved.

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[2] *Before issuing multiple schedules, be certain that the proposed covered construction work involves more than one classification of construction. In some cases a project that involves a mixed-use **property** may involve only one classification of construction, e.g., only the residential units as in the sample building with commercial space on the ground floor. If the proposed work only involves rehabilitation of the residential units and no work in the commercial space, only a residential wage schedule should be issued.*

VI. Important Notes about Multiple Schedules:

~ The project/contract specifications must clearly delineate the portions of the project subject to each wage decision issued.

~ All wage decisions must be posted at the job-site with an explanation as to where each wage decision applies.

~ The developer/prime contractor must agree to establish adequate controls to ensure that all laborers and mechanics are paid in accordance with the wage schedules.

~ All employers (contractor, subcontractors, lower-tier subcontractors) must agree to prepare, submit and maintain accurate employee time and payroll records to demonstrate compliance with all wage decisions applicable to the project.

~ *Use of multiple schedules is contingent upon the agreement and compliance with these conditions.*

VI. Case studies.

The following examples illustrate how the guidance in this *Letter* may be applied to various situations. And, how timely Labor Relations advice may relieve contractors and contracting agencies from inordinate administrative burdens. A description of the project is followed by the wage determination issuance decision and rationale.

1) a. Project The project involves the new construction of 60 family units in three 3-story walk-ups and 50 elderly units in a highrise building; other improvements include clearing and grading, streets, sewers, utilities, play areas, driveways, parking areas.

b. Decision Separate wage decisions, *residential* for the walk-ups **and** *building* for the highrise, may be issued for the construction of the buildings. These are distinguishable components which are substantial in their own right; neither can be considered "incidental" to the other,

therefore, multiple wage decisions are issued *provided* that the contractor agrees to comply with the recordkeeping requirements in paragraph V above.

The site improvements must be considered as well. Since the improvements are incidental to the construction of the housing a separate wage decision need not be issued. To the extent that certain site improvements can be demonstrated to serve the walk-up buildings rather than the highrise building (e.g., parking areas, sidewalks, play areas dedicated to the family units) those site improvements may be completed under the residential wage decision. The remainder of the improvements, i.e., those dedicated to the highrise **and** those common to both the family and elderly units must be completed using the building wage decision.

2. a. Project The project involves the rehabilitation of two large 4-story buildings containing retail/office space on the first floor and residential units on the upper floors. The residential units will each receive new interior walls, windows, doors, carpet, fixtures, appliances, and other finishings. Work in the retail/office spaces will include some electrical and HVAC upgrades, new windows, doors and other exterior finishings consistent with the improvements to the residential units. This work in the retail/office spaces represents 10% of the total rehabilitation costs on these structures.

b. Decision A single *residential* wage decision is issued for all work performed on the two 4-story buildings. Work on the first floor interiors and exteriors is incidental to the rehabilitation work on the upper three floors. This finding of incidental is additionally confirmed because the lower floor work represents less than 20% of the rehabilitation costs.

3. a. Project Assume the same project described in example #2 and add a 3-story parking garage that will be newly constructed adjacent to the two 4-story buildings to serve the residential and retail/office tenants, as well as hourly parking for the general public.

b. Decision The rehabilitation work would still be performed under a single residential wage decision. However, the parking garage would be subject to the *building* wage decision. The garage cannot be considered to be incidental to the rehabilitation work. The garage is substantial in its own right and has as its purpose a service well beyond the residential or retail/office tenants.

4. a. Project A public housing authority (PHA) has undertaken a 3 year comprehensive improvement program, e.g., CIAP project, at one of its larger family developments consisting of several 4-story walk-ups. The total program will involve rehabilitation to all of the housing units in varying degrees. For example, some units will require only cosmetic repairs and minor replacements which can be classified as nonroutine maintenance; other units will require extensive repairs including some "gut rehab," and others are being converted to accommodate larger families (e.g., 2-bedroom units grouped and converted into 5-bedroom units). Other improvements include sidewalk repairs, curb and gutter replacement, parking lot expansion and the installation of a security fence. The PHA has divided the "program" into phases so that the work will be more manageable and to minimize disruption to the residents. The first contract will be awarded for the security fence installation. Immediately thereafter, the PHA will advertise and award a contract for all of the rehabilitation work. The PHA is considering using its own work force to perform some of the work. The PHA sends a request for wage determination to the Labor Relations staff describing the work as "installation of security fence".

b. Discussion *and* Decision For this example, there could be several "right" answers. It would be correct to issue a *heavy* wage decision if the scope of work is limited to a security fence. The PHA's wage decision request and Labor Relation's response, however, may be shortsighted. For example, if the PHA had grouped the security fence with a portion of the rehabilitation work (which calls for a residential wage decision), the security fence could be incidental to the residential work and performed under the same residential wage decision rather than a heavy

wage decision (which often contains much higher wage rates). The same would be true for the sidewalks and other infrastructure improvements: combined with the rehabilitation work on the housing units, the infrastructure could be incidental to the residential work and performed under the same wage decision.[3]

Client agencies may not fully grasp the impact of "phasing" and/or "packaging" certain work items. Labor Relations staff can play a significant role assisting client agencies, like PHAs, to plan work activities to its best advantage.

In this example, Labor Relations could suggest to the PHA that the work items be grouped as described above to secure residential wage rates for those activities. In addition, since the PHA is contemplating using its own maintenance workers (i.e., force account) to perform a portion of the work, the most logical activities for this force account crew are those that can be characterized as *nonroutine maintenance*. These activities will be subject to HUD-determined wage rates which oftentimes are closely related (or even based upon) the maintenance wage rates issued to the PHA. Since PHA force account workers must receive no less than whatever rate is applicable to the type of work they perform, the potential similarity of these wage schedules (maintenance and nonroutine maintenance) may result in less administrative burden to the PHA.

5. a. Project A PHA submits a wage determination request for minor repairs and replacements in 20 housing units which can be characterized as nonroutine maintenance; however, two of those units also require more extensive repairs that exceed nonroutine maintenance parameters.

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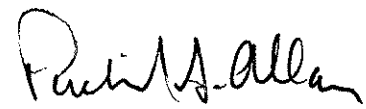
[3] *This "packaging" is not evasive of Davis-Bacon requirements. These work items represent components of the residential development and would have been subject to residential wage rates when the project was first constructed. The components remain an integral part of the development and continue to serve the housing and, in a broad context, remain incidental to the overall residential character.*

b. Decision There are two options available to the Labor Relations staff and the PHA. Following consultation and depending on the PHA's local circumstances and its own needs, all of the work may be performed under the appropriate Davis-Bacon wage decision (residential or building depending on number of stories, etc.) **or** the two units needing extensive repairs can be separated from the nonroutine maintenance work and be performed under a Davis-Bacon wage decision while the nonroutine maintenance is performed under a HUD-determined wage schedule. (Note advance consultation requirement for multiple schedules.) Work items that require Davis-Bacon wage rates **shall not** be considered incidental to other work subject to HUD-determined wage rates.

Any questions concerning this *Letter* may be directed to the Office of Labor Relations at (202)708-0370 or, in the case of HUD program participants, to the HUD Field Labor Relations Staff with jurisdiction for your area.



Assistant to the Secretary for
Labor Relations
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Office of the Assistant to the Secretary for Labor Relations

LABOR RELATIONS LETTERS

Date: October 2, 1995 Letter No. LR-95-01

Subject: **Contract Work Hours and Safety Standards Act (CWHSSA) Coverage threshold for overtime and health and safety provisions**

The *Federal Acquisition Streamlining Act of 1994* amends sections 103 and 107 of the Contract Work Hours and Safety Standards Act (CWHSSA) to establish a single threshold excluding single contracts of $100,000 or less from CWHSSA overtime and health and safety provisions. (Previously, CWHSSA overtime thresholds were $2,000 for construction work and $2,500 for Federal purchases and contracts other than construction.) The new threshold became effective October 1, 1995.

For contracting agencies the effect of the threshold increase will primarily result in reduced procurement burdens on purchases of $100,000 or less. Contractors will continue to be obligated to pay weekly overtime under the Fair Labor Standards Act (FLSA).

Other changes involve overtime provision enforcement activities. FLSA enforcement authority resides solely with the Department of Labor (DOL). Complaints and violations relative to FLSA overtime compensation must be referred to the DOL for further review and disposition. HUD staff and program clients (PHAs/IHAs, CDBG grantees) are still responsible for ensuring contractor compliance with prevailing wage requirements. Where the complaints or violations involve both FLSA overtime and prevailing wages, early consultation with the DOL should occur to determine the most appropriate means to pursue both aspects to resolution.

Proposed language to conform applicable regulations to the statutory amendments was published by the DOL on September 7, 1995. (See *Federal Register*, Vol. 60, No. 173, Pgs 46553-46556.)

Assistant to the Secretary for
Labor Relations

SL: Distribution: W-3-1; R-1; R-3-1; R-6; R-7; R-9; SL (Labor Relations)

Office of the Assistant to the Secretary for Labor Relations

LABOR RELATIONS LETTERS

Date: July 10, 1992 Letter No. LR-92-02

Subject: **Submission requirements for §5.7 Labor Standards Enforcement Reports (Davis-Bacon and Related Acts)**

U. S. Department of Labor (DOL) Regulations (29 CFR 5.7) require Federal agencies to submit a report to the Secretary of Labor on all enforcement actions where underpayments by a contractor or subcontractor total $1,000 or more, *or* where there is reason to believe that the violations are aggravated or willful. These reports must be furnished to the DOL within 60 days after the completion of the investigation. (Note that the $1,000 threshold refers to the underpayments of a single employer to his/her *entire* workforce and not to individual employees.)

HUD Handbook 1344.1 (REV-1, CHG-1) separates the reports into two categories: those which may be submitted to the DOL by the HUD Regional Labor Relations Officer and those that must be submitted through Headquarters. The reporting distinction is made based upon three criteria. A report may be submitted directly to the DOL by the Regional Office if the following conditions exist:

1) There is no reason to believe that the violations were aggravated or willful; and
2) Full restitution and required payments (e.g., liquidated damages) have been made; and
3) No further action (e.g., debarment) is recommended.

Where the Regional Office submits the report directly to the DOL, a copy of the report must be provided to Headquarters Labor Relations.

In *all* other cases, the report must be submitted to the DOL through Headquarters Labor Relations. (See Handbook, Chapter 6, *Reports*.) Note that *all* referrals for §5.11(b) hearings, *all* recommendations for debarment, and *all* referrals for decisions concerning the assessment of liquidated damages for CWHSSA overtime violations *must* be accompanied by a detailed §5.7 report.

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-6, R-7, R-9 (Labor Relations)

Contracting agencies (e.g., PHAs, CDBG recipients, etc.) are also required to submit reports of enforcement activity [see Handbook, Chapter 3, 3-4(g)]. Enforcement reports from contracting agencies must be forwarded to the DOL *through HUD* in accordance with these guidelines. This requirement should be discussed during training sessions and made a part of routine technical assistance.

Timing of the Report

DOL regulations require submission of enforcement reports within 60 days after the completion of the investigation. "Investigation" for the purpose of this discussion is broadly defined as ranging from routine payroll reviews to "full-scale" investigations. Additionally, in this use "investigation" is meant to include all actions taken by the agency or contractor toward disposition of the case including settlement by restitution or refusal to pay and/or a request for a hearing under §5.11(b). Therefore, the §5.7 enforcement report should not be prepared until *after* final disposition at the local level (e.g., restitution, request for a hearing, request for a waiver or reduction of CWHSSA liquidated damages) has been reached. It is not necessary, however, to wait until all of the underpaid workers are located or until disbursement is completed to prepare the report.

Where the report must be submitted to the DOL *through* Headquarters, the Regional Office must furnish the report to this office (Headquarters) sufficiently in advance of the due date to ensure timely submission to the DOL (i.e., within 60 days after completion of the investigation). Consequently, these reports must be received in this office not later than *forty-five (45) days* after completion of the investigation which will allow fifteen (15) days for Headquarters review and transmittal to DOL. (See also Handbook, Chapter 4, *HUD Labor Standards Investigations.*)

Content of the Report

The amount of detail needed in the report and any exhibits is directly related to the purpose the report will serve. Each report should contain basic coverage information, a description of the violation(s), and the disposition of the case, and must be accompanied by a schedule of the wages found due. A report submitted directly to the DOL by the Regional Office (i.e., where restitution has been paid, and there is no evidence of willful or aggravated action with respect to the violations, and no

administrative sanctions are recommended) can be brief. Reports that refer a request for a hearing or that recommend debarment must be much more detailed in narrative and must be accompanied by exhibits which, together, are sufficient to substantiate the violations and document the investigative actions of the agency. Judgment must be used to determine the amount of detail and documentation that is appropriate in each case.

A sample format for §5.7 labor standards enforcement reports is attached. The basic format should be adequate in most cases where restitution has been paid and no further administrative action is recommended. Modifications may be made to appropriately reflect the circumstances of specific cases. The format will need to be expanded where a more detailed report is required (e.g., debarment recommendations, §5.11(b) hearing requests).

The LRAP software currently in development is expected to contain an enforcement report component. If necessary, the instructions contained in this Letter will be modified to ensure consistency.

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for Labor Relations

Attachment

ATTACHMENT **SAMPLE**

MEMORANDUM FOR:

FROM:

SUBJECT: Section 5.7 Enforcement Report

I. Coverage

Project Name: _____
Project No.: _____
Location: _____
(City) (County) (State)
Wage Decision: _____
Program Area/Statute: _____

Prime Contractor: _____
_____
(City) (State)
Subcontractor: _____
_____
(City) (State)

II. Violations

Wage restitution in the total amount of $_____ has been paid to _____ employees by the contractor(s) named above. (See attached Schedule(s) of Wages Found Due.)

Were any of the violations willful? YES NO (Circle one.)
(If yes, see attached detailed report.)

Were CWHSSA liquidated damages computed? YES NO (Circle one.)
(If yes, see attached detailed report.)

Are administrative sanctions recommended? YES NO (Circle one.)
(If yes, see attached detailed report.)

The wage underpayments were discovered through: _____
_____.
The types of violations were: _____
_____.

III. Disposition

(Narrative)

Office of the Assistant to the Secretary for Labor Relations

LABOR RELATIONS LETTERS

Date: July 10, 1992 Letter No. LR-92-01

Subject: **Applicability of Federal wage rate requirements to prison inmates engaged in HUD-assisted maintenance or construction work**

This responds to inquiries as to whether prison inmates can be utilized to perform public or Indian housing authority maintenance or construction work or other HUD-assisted construction work at less than the Federal prevailing wage rates.

There is *no prohibition* against the use of prison inmate labor on maintenance or construction work in either the legislation authorizing HUD-assisted construction or maintenance work (e.g., the U. S. Housing Act of 1937, National Housing Act, Housing Act of 1959, Housing and Community Development Act of 1974, each as amended) or in 24 CFR Part 85, Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments. At the same time, there is *no exemption* from the payment of Federal prevailing wage rates based on the use of prison inmate laborers or mechanics.

Federal prevailing wage requirements governing public and Indian housing maintenance and construction are found at *Section 12(a)* of the U. S. Housing Act (USHA) of 1937. Section 12(a) requires the payment of HUD-determined prevailing wages to "all maintenance laborers and mechanics employed in the operation, of the low-income housing project involved" and the payment of Davis-Bacon wage rates to "all laborers and mechanics employed in the development of the project involved (including a project with nine or more units assisted under section 8 of this Act...)" (emphasis added). Similar labor standards provisions requiring the payment of Davis-Bacon wage rates for other housing programs are found at *Section 212(a)* of the National Housing Act, *Section 202(j)(5)(A)* of the Housing Act of 1959, and *Section 286(a)* of the National Affordable Housing Act (NAHA) as it pertains to the HOME program. Lastly, *Section 110(a)* of the Housing and Community Development Act (HCDA) of 1974 requires that "All laborers and mechanics employed by contractors or subcontractors in

SL: Distribution: W-3-1; R-1 (Regional Labor Relations Officers); R-3-1 (RC); R-6, R-6-2, R-7, R-7-2, R-9 (Labor Relations)

the performance of construction work financed in whole or in part with assistance received under this title..." shall be paid not less than the wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act.

Some exemptions from Federal prevailing wage requirements, based on factors other than the use of prison labor, may be operable in certain cases. For example, some statutory labor standards provisions contain a unit threshold under which the wage requirements *do not* apply. In those cases where the "project" fails to meet the unit threshold, the construction work including work performed by prison inmate laborers and mechanics is *exempt* from Davis-Bacon wage rate coverage. Additionally, since Section 110(a) of the HCDA applies to laborers and mechanics employed by "contractors or subcontractors", it is possible that in certain circumstances prison inmate labor utilized directly by a *grantee* (i.e., *not* employed by a contractor or subcontractor) in the performance of CDBG-funded construction, would *not* be covered by Davis-Bacon wage requirements.

Another exemption may be operable based on the use of bona fide "volunteers." *Section 12(b)* of the USHA and *Section 110(b)* of the HCDA (as enacted by Section 955 of the NAHA) provide individuals an exemption from Federal prevailing wage requirements where the individual:

> "(1) performs services for which the individual volunteered;
> "(2)(A) does not receive compensation for such services; or
> "(B) is paid expenses, reasonable benefits, or a nominal fee for such services; and
> "(3) is not otherwise employed at any time in the construction work."

Similar exemptions were provided by the NAHA at *Section 286(b)* for the HOME program, and Section 801 which created a provision for the use of volunteers on section 202 projects at *Section 202(j)(5)(B)*. (See also 24 CFR Part 70, an interim rule published April 22, 1992, and effective May 22, 1992.)

Prison inmates *shall not* be considered "volunteers" for the purposes of these exemption provisions based solely on their status as inmates. To hold otherwise would result in an unintended and insupportable expansion of the volunteer exemption standard. The following guidance, however,

discusses limited circumstances under which a prison inmate may be considered a "*volunteer*" under these exemptions. (This guidance is applicable only with respect to the four statutory exemption provisions identified above.)

The Federal Bureau of Prisons (BOP) implements a variety of *Federal* prison inmate work release programs including *Short Term Community Based Projects* (see BOP Operations Memorandum No. 225-91 (7320) dated October 9, 1991, "Community Services Projects"). Short Term Community Based Projects that are performed outside the prison institution are considered voluntary program opportunities provided through furlough provisions under Title 18 U.S.C. 3622(a)(6). Inmates *apply* for participation privileges and volunteer status. Inasmuch as another Federal agency (i.e., BOP) will have already designated these individuals as "volunteers" for its own purposes, we have determined that *such inmates may likewise be considered volunteers for the purposes of the prevailing wage exemption provisions named above.*

Prevailing wage exemptions for similar voluntary programs operated by State or local prisons or other correctional institutions shall be considered on a case-by-case basis. Where the use of non-Federal prison inmate "volunteers" is proposed under a State or local program, the proposal must include a full description of the programs and intended use and supervision of the inmates and shall be submitted through the appropriate Field and/or Regional Office Labor Relations staff to Headquarters Labor Relations for consideration and decision.

Lastly, there may be instances where persons convicted of certain offenses may be offered a *choice* of punishments during their sentencing phase. These choices may include community service at a public housing development or other sites and may involve work that is covered by Federal prevailing wage requirements. Where *such individuals indicate community service as their sentence of choice, they may also be considered volunteers under the above provisions and exempt from prevailing wage requirements.* In such cases, a request for approval shall be submitted to the appropriate Field or Regional Office Labor Relations staff. The request must include a written statement from an officer of the Court that the individual has freely chosen a sentence of community service indicating the number of hours, location and any other stipulations on such service. Advance consultation by the

Field Labor Relations Director with Regional or Headquarters Labor Relations staff in approving such requests for community service-volunteer exemption is recommended.

In all cases where prison inmate labor is utilized under the volunteer provisions named above, the responsible agency and/or contractor shall follow the guidance and recordkeeping requirements of 24 CFR Part 70 and Notice 92-01-SL.

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for Labor Relations